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Whither and Whether with the Formative Aim Thesis

Gopal Sreenivasan

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ABSTRACT

According to John Tasioulas, the formative aim of international human rights law is to give effect to moral human rights (insofar as it is appropriate for international law to do so, through the technique of assigning a uniform set of individual legal rights to all humans). In cases of pure human rights inflation, an international legal human right fails to give effect to any moral human right. Tasioulas regards international legal human rights that fit this criterion as morally unjustified. This Article scrutinises various bases on which the inference underlying his conclusion might be validated and argues that none of them succeeds. It concludes that international legal human rights are morally independent of moral human rights. To evaluate them properly, there is no alternative to a detailed case by case analysis. While this analysis may include reference to moral human rights, it is by no means limited to them and need not include them either. Even pure cases of human rights inflation may be morally justified.

TABLE OF CONTENTS

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* Gopal Sreenivasan is the Lester Crown University Professor of Ethics at Duke University. He holds bachelor's degrees from McGill University and the University of Oxford. He earned his Ph.D. in philosophy at the University of California, Berkeley. Sreenivasan has published numerous articles on both rights and human rights. He is currently at work pulling these materials together into his third book, fittingly if unimaginatively entitled, *Rights and Human Rights*.

I. INTRODUCTION

In recent work, including in this Journal, John Tasioulas has advanced and defended the "formative aim thesis" about international human rights law.[1] According to this thesis (FAT, as he styles it),

> (FAT) international human rights law is primarily concerned with giving effect to universal moral rights, insofar as it is appropriate for international law to do so, through the technique of assigning a uniform set of individual legal rights to all human beings.[2]

The objectives of this Article are twofold. First, to examine Tasioulas's defence of the FAT, asking in particular what point is served, in his view, by embracing it. It will be argued, among other things, that the point of the FAT can only be achieved if one accepts a further thesis, to be called the "moral dependence" thesis. Second, it will be argued that the moral dependence thesis is false. On that basis, this Article concludes that insofar as the FAT is committed to something false, it should be rejected.[3] To put the conclusion more constructively, international legal human rights have (much) greater moral independence from moral human rights than either Tasioulas or the FAT allow. As a result, moral evaluation of international legal human rights can pay less attention to moral human rights than Tasioulas and the FAT require. Indeed, in principle, it can proceed without paying any attention to moral human rights.

II. THE FAT

The FAT features in two of Tasioulas's works. These works constitute a coordinated ensemble—something like a two-step, a jab and upper cut, or a parry and riposte, depending on whether one's preference runs to dancing, to boxing, or to fencing. Roughly speaking, in the earlier chapter, Tasioulas articulates the FAT and details the

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1. John Tasioulas, *Exiting the Hall of Mirrors: Morality and Law in Human Rights*, *in* POLITICAL AND LEGAL APPROACHES TO HUMAN RIGHTS 73 (Tom Campbell & Kylie Bourne eds., 2018) [hereinafter Tasioulas, *Morality*]; John Tasioulas, *Saving Human Rights from Human Rights Law*, 52 VAND. J. TRANSNAT'L L. 1167, 1168 (2019) [hereinafter Tasioulas, *Saving Human Rights*].

2. Tasioulas, *Morality*, *supra* note 1, at 80; Tasioulas, *Saving Human Rights*, *supra* note 1, at 1174.

3. The qualification is to allow room for the fact, on which we shall have occasion to elaborate below, that there may nevertheless remain a sense in which the FAT is true. But it should be rejected even if it is true in that sense.

case for accepting it, whereas in the later Article, he wields the FAT to criticise international human rights law. Now this is not to say that Tasioulas's critique is a rejection of human rights law. Rather, it is a partisan internal critique, one that attempts to save human rights law from itself, as it were. Witness his second title.

To begin at the beginning, consider the context in which the FAT is introduced. Tasioulas introduces his thesis in the course of some decidedly sharp criticism of Allen Buchanan's book, *The Heart of Human Rights*.[4] Thus, it stands to reason that the FAT is meant to constitute an alternative to Buchanan's approach, an alternative to the position Buchanan rejects as well as to the one he endorses. For present purposes, the former contrast is the more important one to grasp.[5] Buchanan calls the position he rejects the "Mirroring View" (MV).[6] So the first thing to understand is the difference between the FAT and the MV.

Tasioulas discusses various formulations of the MV, but his summary formulation runs as follows:

> what is primarily at issue in the Mirroring View is a conjunction of two claims: (1) for any given right in [international human rights law] there is typically a counterpart right in human rights morality with the same or substantively equivalent content, and (2) that the latter right is typically either necessary or sufficient to justify the enactment of the former.[7]

Following Buchanan, let the expression "*corresponding* moral human right" designate a moral human right that has the same or substantively equivalent content to a given international legal human right (and is therefore the counterpart to that legal right, in the sense employed in [1]).[8] For example, a moral human right not to be tortured corresponds to an international legal human right not to be tortured. Similarly, a moral human right to be educated corresponds to an

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4. ALLEN BUCHANAN, THE HEART OF HUMAN RIGHTS (Oxford Univ. Press 2013).

5. Not least because Buchanan hardly needs help from me in defending himself. I shall accordingly neglect that aspect of the analysis in Tasioulas. *See* Tasioulas, *Morality*, *supra* note 1. Still, I should perhaps declare that Buchanan and I have together argued for a position that is similar to the one Tasioulas attacks. Allen Buchanan & Gopal Sreenivasan, *Taking International Legality Seriously: A Methodology for Human Rights*, *in* HUMAN RIGHTS: MORAL OR POLITICAL? 211–29 (Adam Etinson ed., Oxford Univ. Press 2018). (As it happens, the publication dates of the two works belie a much closer temporal proximity in composition). Insofar as elements of the joint work are germane to scrutinizing the FAT, they will reappear in the text below, recalibrated where necessary in order to adjust to the details of the present dialectic.

6. BUCHANAN, *supra* note 4, at 14.

7. Tasioulas, *Morality*, *supra* note 1, at 79.

8. Tasioulas uses the phrase "corresponding" in the same sense. *See, e.g.*, *id.* at 79–80 (quoting BUCHANAN, *supra* note 4, at 17, 43).

international legal human right to free primary education. Using this expression, the MV can be neatly synthesized as the following claim:

> (MV) a corresponding moral human right is typically either necessary or sufficient to justify the enactment of a given international legal human right.

In Tasioulas's view, the MV is "breathtakingly crude."[9] Worse, the MV represents a "straw man," so that criticism of it is simply idle.[10] Since Tasioulas's own position is the present concern, there is no need to investigate the facts of how far others may or may not be committed to the MV. One is led to expect that his FAT, at least, will be distinct from the MV. On inspection, this expectation is borne out, as the FAT omits both of the MV's disjuncts.

Take the MV's sufficiency disjunct first. The FAT makes no claim that a corresponding moral human right is "typically sufficient" to justify enactment of a given international legal human right. For while the FAT does assert that international human rights law "aims to give effect" to moral human rights, it also explicitly qualifies this assertion by means of the clause, "insofar as it is appropriate for international law to do so."[11]

Tasioulas helpfully distinguishes two different ways in which it may be inappropriate for international law to give effect to a particular moral human right. On the one hand, it can be inappropriate if there are principled constraints against giving (international) legal effect to the moral right. For example, such constraints may apply to moral rights operating in the private sphere, such as a right to a certain distribution of domestic labour or a right to a say in major family decisions.[12] On the other hand, giving legal effect to a particular moral human right can also be inappropriate if there are practical constraints against doing so. For example, legal implementation of a given moral right may be counterproductive or simply ineffective.[13] Tasioulas's later discussion of the case against judicialising the right to health can also be read as illustrating these possibilities.[14]

Now consider the MV's necessity disjunct, according to which

> (NMV) a corresponding moral human right is typically necessary to justify enactment of a given international legal human right.

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9. *Id.* at 80.
10. *Id.*
11. *Id.*
12. *Id.* at 80, 82. The examples in the text illustrate principled constraints that cut equally against domestic or international legal implementation. Assuming there are some matters on which states properly enjoy domestic autonomy from international law, there may be other examples where a principled constraint against giving legal effect to a moral human right operates solely in the realm of international law.
13. *Id.* at 80, 88.
14. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1198–1204.

The FAT definitely does not include the NMV either, but this is less straightforward because the explanation does not turn on any part of the FAT's explicit content. Rather, it has to do with an interaction between the terms "typically" and "corresponding" in the NMV. Tasioulas borrows the qualification "typically" from Buchanan, who uses it to acknowledge that some proponents of the MV freely accept two exceptions to the unqualified versions of the MV's claims.[15] In all of the cases envisaged, the justification of a justified international legal human right remains anchored in some fashion in a moral human right. Occasionally, however, the anchoring moral human right does not *correspond* to the legal right. That is to say, the contents of the two rights are not substantively equivalent.

In one kind of case, the justified legal right (further) specifies the moral right, as opposed to more or less reproducing its content. Buchanan's example is a legal right to freedom of the press, where the anchor for its justification is taken to be the moral right to freedom of expression.[16] In the other kind of case, the relation between the two rights is even looser. More specifically, the justificatory tie between the two rights is purely instrumental, so that there need be no particular conceptual connection between their respective contents. Buchanan's example is an international legal human right to democratic government, which is taken to be justified on the basis of its instrumental efficacy in realising some moral human rights or other—the moral human rights not to be tortured and not to be arbitrarily imprisoned,[17] say—all on the assumption that there is no moral human right to democratic government.[18]

Each of these kinds of cases describes a situation in which an international legal human right is justified, and its justification is anchored in a moral human right, but the moral right does not "correspond" to the legal right. Hence, both represent cases in which a corresponding moral human right is not necessary to justify some (justified) international legal human right. They therefore flout the rule that the NMV claims to govern the relationship between moral human rights and justified international legal human rights. However, neither case constitutes a counterexample to the NMV. For the NMV has been judiciously crafted and merely claims that its rule holds "typically," not that it holds without exception.

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15. Tasioulas, *Morality*, *supra* note 1, at 79 (quoting BUCHANAN, *supra* note 4, at 17).

16. BUCHANAN, *supra* note 4, at 17.

17. Thomas Christiano, *An Instrumental Argument for a Human Right to Democracy*, 39 PHIL. & PUB. AFF. 142, 145 (2011). Christiano himself argues for a moral human right to democracy, rather than an international legal human right. But I am only borrowing his examples and am not invoking or endorsing his argument here.

18. BUCHANAN, *supra* note 4, at 17.

The disagreement between the NMV and the FAT centres on the question of how "exceptional" these two kinds of flouting cases are. According to the NMV, they must be very exceptional. After all, what the NMV claims is that its rule is "typically" satisfied, and this evidently excludes widespread exceptions. By contrast, Tasioulas suggests that these exceptions are much more common than the NMV allows. Or, more cautiously: "It is entirely possible, for example, that rather than being 'exceptions,' the phenomena of specification and instrumentalization extensively characterize the proper relationship between these two bodies of norms."[19] His FAT, then, does not so much pronounce explicitly on this question as it simply omits to commit itself to the restriction that is built into the NMV. Unlike the NMV, therefore, the FAT is perfectly consistent with the possibility that specification and instrumentalization are indispensable to the justification of many international legal human rights.

III. AVOIDING LABELING ERRORS AND OTHER GROUNDWORK

Before turning to consider the basis on which Tasioulas affirms the FAT, it will be useful to clarify four preliminary points. To begin with, the NMV is not simply about the relationship between moral human rights and international legal human rights. What is at issue, more specifically, is the relationship between moral human rights and the *moral justification of* international legal human rights.[20] Unlike with moral rights, being justified is not built into the existence conditions of legal rights. There is no incoherence in a legal right's existing—or, for that matter, even being validly enforced—despite not being morally justified. Likewise, there is no incoherence in a legal right's not existing, even where it is morally justified to enact it. Tasioulas sometimes writes as if the question concerned the relationship between moral human rights and the (mere) existence of international legal human rights,[21] but these are better treated as slips.

Further to this point, a legal right's being justified is actually an ongoing proposition, which is not limited to whether the right is or was justified to enact in the first place. Nor does the fact that a legal right was justifiably enacted suffice to establish that the right is justified now, though it does contribute significantly to that conclusion. Facts

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19. Tasioulas, *Morality*, *supra* note 1, at 80.

20. The same goes for the MV itself. But for reasons that will become clear, we will really only be interested in the NMV in what follows. Throughout this Article, "justification" means moral justification.

21. For example, "[n]or is there a compelling basis for pinning on orthodox theorists the thesis that enacting an international legal right requires, as a necessary condition, the existence of a background moral human right with broadly matching content." *Id.*

change. So a legal right that once was justified may later become unjustified. The MV and the NMV refer narrowly to justifying "enactment" only because they were fashioned to recapitulate passages from Tasioulas.

Next, any discussion of the relationship between moral human rights and international legal human rights obviously presupposes some distinction between them.[22] Even if the general distinction between moral rights and legal rights is taken for granted, this will only cover part of the analytical work that needs to be done. A very substantial, and controversial, question still remains about what makes some moral rights (and not others) *human* rights in particular; and likewise, with some international legal rights (and not others). For many contributors to the philosophical literature on human rights, this is *the* question (or at least, the bit about moral rights is).[23]

This Article will not attempt to engage that enormous controversy, though it will not be possible to avoid making some assumptions about it. Instead two very important points will be registered here. They stand to the side of what is elsewhere the main controversy, but are highly germane to the discussion to follow. First, it is not compulsory to employ exactly the same criteria to mark legal human rights off from other legal rights as one employs to mark moral human rights off from other moral rights. Alternatively, it is not compulsory to answer "the" controversial question exactly the same way for the two realms of rights, moral and legal.

One option is to mark the distinction in purely structural terms, while leaving material differences between the two realms of rights in place. For example, human rights could be distinguished from other rights, in both cases, simply through being universally distributed (i.e., every individual has them),[24] even though universal legal rights are still not moral rights. A criterion of universal distribution suffices to disqualify some international legal rights held by individuals from being human rights. For example, it disqualifies rights to immunity from prosecution held by diplomats.[25] Another option is to embrace nominalism for the legal case, while adopting some substantive criterion for the moral case. According to nominalism, legal human

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22. Buchanan devotes considerable attention to the significance of this distinction. *See* BUCHANAN, *supra* note 4.

23. For example, *see* the various contributions to HUMAN RIGHTS: MORAL OR POLITICAL?, *supra* note 5, at Part II.

24. This is one respect in which Tasioulas explicitly accepts that international legal human rights do "mirror" moral human rights. Tasioulas, *Morality*, *supra* note 1, at 80–81.

25. Andrea Sangiovanni, *Are Moral Rights Necessary for the Justification of International Legal Rights?*, 30 ETHICS & INT'L AFF. 471, 475–76 (2016) (Sangiovanni uses the example for a different purpose, indeed one inconsistent from mine).

rights are just whatever legal rights are called "human rights" in some valid law (e.g., some valid international treaty).[26] As things stand, nominalism also happens to entail that international legal human rights are universally distributed. But this result is not guaranteed under nominalism.

Second, if anything other than nominalism is adopted for the legal case, the possibility arises that international human rights law may contain what might be called "labeling errors." Crucially, such labeling errors introduce an ambiguity in otherwise straightforward attempts to ask about the justification of international legal human rights.[27] This ambiguity will be most consequential where one's criterion for what makes a legal right a *human* right just is "gives effect to some moral human right."[28] To illustrate, consider Raz's example of the international legal human right to adequate housing.[29] For the sake of argument, assume that there is no moral human right to adequate housing *and* that this legal right serves no other moral human right either. On the aforementioned criterion, it follows that there is no international legal human right to adequate housing. While Article 11(1) of the International Covenant for Economic, Social and Cultural Rights (ICESCR) does indeed create a valid international legal right to adequate housing, this right does not count as a human right.[30] Since the ICESCR nevertheless calls this right a human right, it contains a labeling error.

Is the international legal human right to adequate housing morally justified? Unfortunately, this question now turns out to be ambiguous as between two possibilities.[31] One possibility is that it means: Is Article 11(1) of the ICESCR morally justified? The other

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26. In our joint paper, Buchanan and I adopt this expedient for international legal human rights. We did so as a matter of convenience, rather than as a principled position. Buchanan & Sreenivasan, *supra* note 5.

27. Insofar as one is interested in focusing on this very question, that is precisely a reason to adopt nominalism for the legal case.

28. But labeling error (and therefore, ambiguity) can arise even when one's criterion is the apparently anodyne structural requirement that a legal right must be universally distributed in order to count as a human right. As far as I know, no existing international treaty creates a labeling error under this criterion, at least not for individual human rights. But, in principle, nothing prevents a future treaty from assigning an international legal right it calls a "human right" to a subset of individuals world-wide, in contravention of the anodyne criterion.

29. Joseph Raz, *On Waldron's Critique of Raz*, *in* HUMAN RIGHTS: MORAL OR POLITICAL?, *supra* note 5, at 141. As Raz observes, this is recognized as a human right as part of Article 11(1) of the International Covenant for Economic, Social and Cultural Rights (ICESCR). International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

30. Raz, *supra* note 29, at 141.

31. Of course, there are really more than two ways of dividing up the possibilities. But the important point is that they all fall into two groups, one in which the labeling error does not get in the way of a sensible question and another in which it does. The possibilities described in the text can be seen as simply illustrating the respective groups. However, neither group leaves one in a good position.

possibility is that it means: Is the international legal right that is both a right to adequate housing and a human right morally justified? Insofar as "giving effect to some moral human right" is a necessary condition of any *legal right's* counting as a human right, the original question cannot be answered on *either* interpretation. Consider the first interpretation first. By hypothesis, Article 11(1) is not a human right. So discovering whether Article 11(1) is justified will not answer the question of whether the international legal human right to adequate housing is morally justified. Now consider the second interpretation. There is no legal right that is both a right to adequate housing and a human right (again, by hypothesis). This version of the question therefore has no answer at all because it fails to refer.

It may now be easier to appreciate the force of the previous point. Its force is that it is certainly possible to avoid being prevented from answering questions about the justification of international legal human rights that have been labeled in error. In particular, this predicament can be avoided *no matter what* the correct criteria are for distinguishing *moral* human rights from other moral rights. Suppose Tasioulas is correct, for example. In his view, "[moral] human rights are moral rights possessed by all human beings simply in virtue of their humanity (and discoverable through ordinary moral reasoning)." [32] If his account for the moral case is paired with nominalism for the legal case, the possibility of labeling errors in international human rights law is excluded altogether. Both the ambiguities these errors introduce and the predicament associated with them are thereby avoided.

This Article shall assume that one should be able to answer questions about the moral justification of international legal rights like Article 11(1) of the ICESCR—even, that is, under the assumption that it does not give effect to any moral human right—and that an analysis of human rights should be helpful in this endeavor.[33] Depending on

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32. Tasioulas, *Morality*, *supra* note 1, at 74.

33. Somewhat perversely, there is one advantage to not being able to answer questions about the moral justification of international legal human rights that have been labelled in error. Namely, if our analysis makes "giving effect to some moral human right" a necessary condition *both* of an international legal right's being a human right *and* of its being morally justified, that analysis will be immune to counter-examples on the model of Article 11(1) when the legal rights in question are described as human rights. Since putative counter-examples to the second claim (about the legal rights being morally justified) will also necessarily involve a labeling error, the question itself will fail to refer (and so its non-answer cannot count against the analysis). However, since this "advantage" comes at the evident cost of disabling the analysis from answering the very question at issue, I would not have guessed that anyone would be tempted to reach for it. But it seems that I am wrong about that. *See* Erasmus Mayr, *Instrumentalism and Human Rights: A Response to Buchanan and Sreenivasan*, *in* HUMAN RIGHTS: MORAL OR POLITICAL?, *supra* note 5, at 230–37; Sangiovanni, *supra* note 25 (tying the conditions

what the truth is about the substance and the extent of moral human rights, many international legal human rights will at least be vulnerable to falling into the category of "labelled in error" if the criteria for legal rights tie the label "human right" *to some moral* human right. If nominalism for the legal case seems too promiscuous, the structural criterion of universal distribution—every individual has the right—can still succeed in excluding labeling errors for international human rights law, at least as it presently exists. Since this criterion is also more congenial to Tasioulas's position, this Article will adopt it.[34]

Finally, and perhaps most importantly of all, *even if* Article 11(1) of the ICESCR has been labeled in error, it does not follow that Article 11(1) is morally unjustified.[35] Of course, if it has been labeled as a human right in error, it follows trivially that Article 11(1) is not justified *as* a human right.[36] Similarly, if there has been a labeling error, that presumably counts for something *against* Article 11(1)'s being a morally justified legal right. However, after all of that, one still has to consider what counts in favour of Article 11(1)'s being a justified legal right, as well as where the balance of considerations on all sides lies. Hence, notwithstanding the labeling error, the question of whether Article 11(1) is morally justified is still open and very much in need of separate evaluation.

IV. TASIOULAS'S RECIPE FOR CARVING DOMAINS

Tasioulas's case for accepting the FAT has two main planks in it. In fact, his case is perhaps better described as a "recipe for a case," but it will still be useful to discern the structure of the recipe.

His first plank is that the FAT belongs to the "long-established self-understanding" of the participants in the practice of human rights.[37] As evidence for this, Tasioulas adduces an aspect of the

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under which international legal human rights are justified to the conditions under which international legal rights are correctly labeled as human rights).

34. In principle, it would be relevant to object that by restricting the options for how to distinguish legal human rights from other legal rights to nominal, structural, or moral criteria, our discussion omits functional criteria and therefore unduly prejudices matters against "political" accounts of human rights. This might be damaging in another context. However, since Tasioulas rejects political accounts, he is no position to press this point. A somewhat weightier version of this objection will recur in Part VII below, which discusses moral justification instead of labeling.

35. Raz explicitly accepts this proposition. Indeed, it is part of the point he makes with the example. Raz, *supra* note 29, at 141–42. For that matter, Mayr accepts it too. Mayr, *supra* note 33, at 231–32.

36. But then again, it follows equally that it is not *un*justified "as" a human right. It is not anything *as* a human right because (by hypothesis) it is not a human right. We could make the same points about what follows from Article 11(1)'s being erroneously labeled as a "can of soup."

37. Tasioulas, *Morality*, *supra* note 1, at 83.

history of Article 27 of the Universal Declaration on Human Rights.[38] In this connection, it bears mention that one of Tasioulas's disputes with Buchanan concerns how central international human rights *law* is to the *explanandum* of a theory of human rights.[39] It is not clear whether the place that Tasioulas claims for the FAT in the self-understanding of the practice is meant to be something that can be established in relation to international human rights law alone or whether this plank turns somehow on accepting his own wider understanding of human rights practice (i.e., of where its centre lies).

By contrast, Tasioulas's second plank is clearly intended to be simply a matter of how best to interpret international law. It holds that the FAT provides international human rights law with "its coherence as a domain within public international law, distinguishing it in a principled way from other domains of law, such as humanitarian law, the law of the sea, and so on."[40] Tasioulas recognises that other areas of international law also "give effect" to moral human rights.[41] What distinguishes international human rights law from other areas, however, is that giving effect to moral human rights is its *primary* goal and that it accomplishes this goal via a "distinctive technique," namely, by "assigning a uniform set of individual legal rights to all human beings."[42]

To reinforce this plank, which seems to be the more important of the two, Tasioulas offers an analogy to municipal law.[43] Although his analogy is grounded in plural examples, one illustration will suffice for present purposes. Following Charles Fried, Tasioulas observes that the moral notion of a promise serves as the "core organizing idea" of contract law.[44] Contract law, in other words, can be distinguished from other domains of municipal law—from restitution and tort, say—by reference to "its primary aim of recognizing and giving effect to certain promises that are apt for legal enforcement."[45] Thus, Tasioulas's suggestion is that moral human rights play the same organising role for international human rights law that promises play for contract law.

If it succeeds, what the municipal analogy demonstrates is that there is an established role—namely, that of "core organizing idea"—

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38. *Id.* at 82. The distinction between the planks, as I am calling them, as well as the specific association of this anecdote with the first plank, is even clearer in Tasioulas's Article. *See* Tasioulas, *Saving Human Rights*, *supra* note 1, at 1176–77.

39. Tasioulas thinks that Buchanan exaggerates its centrality. *See* Tasioulas, *Morality*, *supra* note 1, at 78.

40. *Id.* at 80.

41. *Id.*

42. *Id.*

43. *Id.* at 81.

44. *Id.* (citing CHARLES FRIED, CONTRACT AS PROMISE (2d ed., Oxford Univ. Press 2015)).

45. Tasioulas, *Morality*, *supra* note 1, at 81.

for moral human rights to play in relation to international human rights law. Moreover, *if* moral human rights do play this role, then the FAT is correct. For all the FAT says, more or less, is that they play that role. However, the municipal analogy itself is silent—for example, the facts about the organisation of contract law are silent—on the pivotal question of whether moral human rights do play that organising role for international human rights law. Nothing else Tasioulas supplies in "Exiting the Hall of Mirrors" constitutes evidence on that score either. That is why his discussion in that chapter is better seen as a recipe for a case.

To follow through on this recipe, and secure an actual case for the FAT, would require drilling down into the details of international human rights law, as well as some comparison with alternative bases on which international human rights law might be distinguished as a distinctive domain of public international law. For it is not really enough even to show that the FAT *is* adequate to the task of distinguishing the relevant domain of international law. What has to be shown, further, is that the FAT is also better than the alternatives.

Since the FAT itself comprises at least two distinct components, a particularly salient alternative with which it needs to be compared is a stripped-down version of itself. If, for example, simple reliance on the "distinctive technique" of assigning a uniform set of individual legal rights to all human beings were *just as good* at distinguishing international human rights law from other domains of public international law—just as good, that is, as the full-blown FAT—then the case for its additional component would fall away. But its "additional" component, of course, is precisely the goal of giving effect to moral human rights (insofar as it is appropriate for international law to do so).[46] Hence this comparison is of some consequence.

In what remains, and for the sake of argument, this Article shall nevertheless treat the case for the FAT as having already been made out. It will thus pivot from Tasioulas's parry to his riposte. This means shifting attention from his previous chapter to his present Article. The question therefore becomes: *to what end* is the FAT supposed to be accepted? Whither the FAT?

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46. In principle, we should distinguish the claim that international human rights law has this goal from the claim that it is the *primary* goal. Thus, the FAT really has three components, and it is the third component (primary goal) that seems to do a lot of the work. By the same logic, this third component also has to be shown to outperform the alternative constituted by the other two.

V. TWO DEVIATIONS FROM THE FAT

A central theme of Tasioulas's Article in this Journal is that international human rights law has strayed or deviated from its formative purpose, as identified by the FAT.[47] It has strayed, that is to say, from its purpose of giving effect to moral human rights, insofar as it is appropriate for international law to do so. Indeed, it has deviated in a number of respects. While Tasioulas concentrates on two specific kinds of deviation, it is clear that these are only meant to be examples standing in for an open-ended list.[48] For the most part, this Article shall concentrate on Tasioulas's first example. But it will be helpful to begin with the second.

In general terms, Tasioulas's second example is the tendency of international human rights law to overlegalise—and even more, to overjudicialise—moral human rights. Here the feature of the FAT from which international law deviates is its proviso, "insofar as it is appropriate for international law to do so." As articulated in Part II, this proviso prevents any moral human right from operating as a sufficient condition of justifying an international legal human right. More specifically, the proviso prevents this by imposing, in effect, two additional necessary conditions on justifying any particular international legal human right. These correspond to the principled and the practical constraints distinguished earlier, contravention of which makes it "inappropriate" to give legal effect to a given moral human right, however important that moral right may otherwise be.

By way of illustration, consider Tasioulas's discussion of the judicialisation of the international legal human right to health.[49] For concreteness, he focuses on "the relatively strong form according to which a right is justiciable if its possessor is empowered to seek their entitlements under the right in question to be granted to them by means of a judicial decision upholding that right."[50] Tasioulas identifies four limitations on making the legal right to health "justiciable" in this sense.[51] Of these, the second limitation most clearly embodies his practicality constraint, since it holds that "enabling litigants to claim their entitlements under those rights in court may be counterproductive so far as overall compliance with human rights is concerned."[52] As examples of contraventions of this constraint, Tasioulas adduces the cases of Brazil and Colombia, where

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47. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1169.
48. *Id.* at 1178–79.
49. *Id.* at 1203–04.
50. *Id.* at 1202.
51. *Id.* at 1203–06.
52. *Id.* at 1204.

there is a strongly justiciable constitutional right to health; and where, so his citations suggest, the effects have indeed been counterproductive.[53]

Prospectively, the immediate conclusion that follows, on Tasioulas's analysis, is that the moral human right to health should not be made strongly justiciable in cases where the second limitation applies. Retrospectively, what follows immediately is that the constitutional rights to health in Brazil and Colombia, which have already been made strongly justiciable (against the second limitation), are not morally justified. In each case, the argument for this conclusion is that the legal right to health in question fails a necessary condition on its moral justification. A subsequent conclusion, for the retrospective cases, is that international human rights law should be reformed, to "[bring] it into greater alignment with the human rights morality it is supposed to advance."[54] Finally, Tasioulas goes on to speculate that excessive deviations from the FAT "may help to explain some of the popular backlash encountered by [international human rights law]."[55]

The point served by accepting the FAT is therefore clear: The FAT provides a licence to evaluate international human rights law and thence, to reform it. Elsewhere Tasioulas describes the FAT as the "governing rationale" of international human rights law and "the starting point for [his] rescue operation" (viz., of saving international human rights law from itself).[56] Examining his second example of a deviation from the FAT also clarifies how this licence works, namely, by articulating and applying necessary conditions on the moral justification of international legal human rights. In any case, that is how Tasioulas secures his immediate conclusion that a strongly justiciable international legal human right to health is not morally justified. He acknowledges, of course, that fully executing his reform project "requires mobilising many different forms of expertise," going well beyond philosophy. [57] For present purposes, though, his immediate conclusion, representing his philosophical contribution to the reform, is all that matters.

Now, in principle, Tasioulas's analysis works the same way with his first example, which centres on the failure of international human

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53. Tasioulas cites Octavio Ferraz, *Health Inequalities, Rights, and Courts: The Social Impact of the "Judicialization of Health" in Brazil*, *in* LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? (Alicia Yamin & Siri Gloppen eds., Harv. Univ. Press 2011); David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189 (2012).

54. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1173. Later in the Article, he makes the same point in different language, by urging us to "discipline [international human rights law] in line with the FAT." *Id.* at 1191.

55. *Id.* at 1178.

56. *Id.* at 1169, 1207.

57. *Id.* at 1173.

rights law consistently to observe the distinction between universal moral rights and universal human interests or values. That distinction, in turn, rests on the "fact that moral rights are associated with obligations," whereas interests or values (even universal ones) are not necessarily so associated. [58] What emerges in cases where international human rights law collapses this distinction, he argues, is "human rights inflation."[59] In other words, what emerges are other cases where an international legal human right is not justified. The purest specific examples Tasioulas offers of this first kind of deviation from the FAT are the international legal human rights to annual paid leave, to internet access, and to same-sex marriage.[60]

With both kinds of deviation from the FAT, then, there are cases where an international legal human right is not morally justified. However, there is still a significant difference between the two examples. As this Article has already shown, the licence to evaluate the second example (overjudicialisation) derives from the FAT's proviso on appropriate legalisation. But any licence to evaluate the first example (rights inflation) must derive from something else. That is because what the proviso's necessary conditions (e.g., the practicality constraint) are conditions *on* is the appropriateness of giving legal effect to a moral human right. Hence, they presuppose that there *is* a moral human right to which the international legal right being evaluated gives effect. By contrast, what is characteristic of the pure rights inflation cases is precisely that there is no moral human right to which they (e.g., the legal right to annual paid leave) give effect,[61] but merely a human interest. That, recall, is why Tasioulas objects to them.

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58. *Id.* at 1179.

59. *Id.* at 1181.

60. *Id.* at 1178. The other specific example Tasioulas provides concerns the *scope* of the international legal human right to health. In the next note, I shall explain why this is an impure example. But in calling it impure, I do not mean to be objecting to it. As a separate matter, the right to health example is inherently messy; and Tasioulas and I also disagree about many of its details. It therefore seems better—certainly, it will be cleaner—to leave it to the side here.

61. What makes the health case an *impure* example, at least for Tasioulas, is the fact that he fully accepts that there is a moral human right to health, even if its scope is narrower (or less "bloated") than that of the international legal right. *Id.* at 1186. This both tempers the extent to which he finds the international legal human right to health to be unjustified and arguably makes this case an instance of his second deviation rather than his first. Both kinds of deviation from the FAT represent cases where international human rights law "overdoes it" with respect to moral human rights. In that sense, they are both kinds of inflation. But, as I understand it, what characterizes the second example is that, there, international human rights law inflates from a little something to a lot, whereas in the first example it inflates from nothing to something. Notice, in any case, that the international legal human right to health features as an illustration of both deviations in Tasioulas's text.

For concreteness, consider Tasioulas's example of the international legal human right to annual paid leave.[62] To advertise its status as a case of pure "rights inflation," assume that there is no moral human right to annual paid leave and that this international legal right serves no other moral human right. These stipulations parallel those made in discussing Raz's example of the international legal human right to adequate housing. According to Tasioulas, the international legal human right to annual paid leave is not morally justified.[63] But where does the licence for his evaluation originate?

This Article's claim is that this licence has to originate from outside of the FAT. There are two obstacles to locating it within the FAT. One is superficial, but nevertheless striking, and the other is simply decisive. Consider them in order. On the face of it, neither the creation of an international legal human right to annual paid leave nor the claim that this right is morally justified actually contradicts the FAT at all; and not simply because it is only one right (and so can fall within any margin of error).[64] Of course, by hypothesis, this international legal right does not give effect to any moral human right and therefore does nothing to advance the primary aim of international human rights law, as identified by the FAT. Presumably, however, international human rights law can also have secondary aims—the FAT's explicit language of "primary" aim seems to permit them. Moreover, there is nothing exclusive in the formulation of the primary aim itself. As a result, there remains a very important difference between "failing to make contact" with that primary aim and "contradicting" it. Somewhat surprisingly, then, there seems to be nothing in the FAT to license the conclusion that the international legal human right to annual paid leave is not justified.[65]

Naturally, this lacuna could always be remedied by reformulating the FAT. For example, perhaps the FAT would be improved if it were amended to say that giving effect to moral human rights is the *sole* independent aim of international human rights law, which would contradict claims that some international legal human right that had been inflated *ex nihilo* was morally justified. Or perhaps that is what

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62. *See* ICESCR, *supra* note 29, at art. 7(d).

63. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1178.

64. There is no mention in the FAT of any margin of error (akin to the "typically" in the NMV). But in both the contract law and criminal law examples developed as part of Tasioulas's municipal analogy, there is not only explicit permission for some deviation from the core organising idea, but also explicit tolerance for extending the relevant domain on the basis of extraneous materials (e.g., economic considerations in contract law). So perhaps, by analogy, the FAT countenances a margin of error after all. *See* Tasioulas, *Morality*, *supra* note 1, at 81–82.

65. If one took Tasioulas's speculative backlash hypothesis very seriously, there might be room to construct an instrumental argument against the international legal human right to annual paid leave, based on the negative effects of the backlash on the general enterprise of human rights, at least if these rose to the level of jeopardizing the primary aim of international human rights law.

Tasioulas meant all along. Either is certainly possible. Unfortunately, this strategy—changing things up some—only foreshadows the decisive obstacle.

Unlike the superficial obstacle, the decisive obstacle has to do with Tasioulas's case for the FAT, rather than the content of his thesis *per se*. Tasioulas's case is purely descriptive. Its two planks describe, respectively, the historical self-understanding of the participants in the practice of human rights and the contours or shape of a certain domain of public international law. Insofar as these planks are accurate, they establish that the FAT is a descriptive truth.

Ultimately, however, the FAT plays a normative role in Tasioulas's argument. It serves to license evaluations of international human rights law—for example, to license the conclusion that the international legal human right to annual paid leave is not morally justified.[66] No purely descriptive case is adequate to that task. Either the FAT itself has some evaluative content, which Tasioulas's case does not reach, or it has no evaluative content, in which case the FAT is ill suited to its role (however adequate Tasioulas's case may be to the FAT). In each case, though, there is a gap between Tasioulas's case for the FAT and its normative role. That is the decisive obstacle to locating the relevant licences in the FAT.

It may help to spell this point out. Return to the over-judicialisation example, since there the letter of the FAT as written does lay down a necessary condition (in the form of the practicality constraint) that a strongly justiciable right to health fails.[67] The first plank of Tasioulas's case for the FAT entails that a strongly justiciable right to health contravenes the participants' historical self-understanding of the primary aim of international human rights law. But absent some ground to affirm that this self-understanding *should* not change and *should* "not be eschewed," it does not follow that a strongly justiciable right to health is not justified. [68] Likewise, Tasioulas's second plank entails that a strongly justiciable right to health undermines the distinctive shape that international human rights law has as a domain of public international law, and, at the limit, leads to its ceasing to be a distinctive domain of international law at all. Again, however, absent some ground to affirm that international human rights law *should* remain a distinctive domain of

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66. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1178.

67. As an incidental merit, this will also make clear that the decisive obstacle applies equally to the FAT's ability to license evaluations of the second kind of deviation Tasioulas discusses.

68. *See* Part II of Tasioulas, *Saving Human Rights*, *supra* note 1, at 1173 subtitled, "The Formative Aim of International Human Rights Law: or, Not Eschewing the FAT."

public international law, it does not follow that a strongly justiciable right to health is not justified.[69]

VI. THE MORAL DEPENDENCE THESIS

This Article will now introduce the moral dependence thesis (MDT). According to this thesis,

> (MDT) it is a necessary condition on the moral justification of a given international legal human right that it be suitably related to some moral human right.[70]

Unlike the FAT, the MDT clearly licenses Tasioulas's conclusion that the international legal human right to annual paid leave is morally unjustified, at least under the previous stipulations. For under those stipulations, there is no moral human right served by this international legal right.[71] Hence, it fails a necessary condition on its moral justification.

Of course, the MDT has merely been stated here and no case has been provided for it, whereas Tasioulas did mount a case for the FAT. So perhaps it would be more judicious to say that the MDT clearly *entails* that the international legal human right to annual paid leave is morally unjustified. In this way, the MDT does for pure rights inflation cases (first deviation) exactly what the FAT does for overjudicialisation cases (second deviation); and even does it by the same mechanism, namely, by articulating a necessary condition on the moral justification of international legal human rights, a necessary condition the cases in question fail. To turn either of these necessary conditions into a true licence to evaluate international human rights law, one would have to argue for it properly.

This Article will not mount any case for the MDT, not least because it will later argue that the MDT is false. But that does not really matter here, since the more judicious statement is fully adequate for present purposes, which are to suggest that Tasioulas's analysis of

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69. Strictly speaking, what is required is not simply grounds to affirm that international human rights law should be a distinctive domain of international law, but grounds to affirm that it should remain a distinctive domain *with its present shape*. Otherwise, the possibility remains open that international human rights law can be reconstituted as a different distinctive domain of international law, albeit one that now includes a (perfectly justified) strongly justiciable right to health.

70. At the conference in Nashville, and in homage to Chow-Yun Fat, I called this thesis the "hidden dragon" thesis. But in writing I have presumed that a more sober sobriquet is in order.

71. Recall that this is the characteristic feature of what I have been calling cases of pure rights inflation. The right to annual paid leave is just a representative example, borrowed from Tasioulas. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1178.

human rights commits *him* to the MDT, as a supplement to the FAT.[72] The argument for this attribution is very simple. It is that the MDT entails a conclusion that Tasioulas affirms and for which he needs an argument that his own FAT does not supply. The general form of the relevant conclusion is that cases of pure rights inflation are not morally justified (e.g., the international legal human right to annual paid leave is not). Alternatively, the MDT gives Tasioulas an argument that he needs and which he would otherwise lack.[73]

Before turning to argue against the MDT, though, it will be instructive to compare it briefly to the NMV, which Tasioulas explicitly rejects.[74] As a reminder, the rejected thesis holds that

> (NMV) a corresponding moral human right is typically necessary to justify enactment of a given international legal human right.

Both the MDT and the NMV articulate necessary conditions on the justification of international legal human rights; and both are well suited, unlike the FAT, to evaluating pure rights inflation cases. Unlike the NMV, the MDT does not restrict its necessary condition to *corresponding* moral human rights. Any moral human right that stands in some justificatory relation to the international legal human right being evaluated will do. The MDT does not try to limit, or even to specify, what these justificatory relations might be. As argued in Part II, the NMV's correspondence requirement was the basis on which Tasioulas rejected it. To this end, he adduces cases in which an international legal human right's justificatory relation to a moral human right is specificatory or instrumental, neither of which relation involves a corresponding moral human right. In all of these cases, however, the justification of a justified international legal human right remains anchored in some moral human right or other.[75] All of these cases therefore satisfy the MDT perfectly well.

Furthermore, and again unlike the NMV, the MDT does not include the margin of error qualification "typically." It could always be revised to include one, if this were somehow found to be important. But it is worth observing that while such qualifications may be useful for evading counterexamples, they also come at a cost. Sophistication is a

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72. This supplement serves to cover the first deviation, leaving the second deviation to be covered by the FAT. Thus, the MDT is not to replace the FAT.

73. In the background here is an assumption on my part that no other supplements to the FAT are available to Tasioulas, besides the MDT.

74. Tasioulas, *Morality*, *supra* note 1, at 79–80.

75. More generally, all the cases Tasioulas adduces in rejecting the NMV for himself fit this pattern. *See, e.g.*, Tasioulas, *Morality*, *supra* note 1, at 88 n.23; *see also* Tasioulas, *Saving Human Rights*, *supra* note 1, at 1185 (describing moral human rights as the "normative roots" of international legal human rights).

double-edged sword. For example, unlike the MDT, the NMV does *not* entail that the international legal human right to annual paid leave is unjustified, not even under our stipulation that there is no moral human right to annual paid leave (i.e., there is no corresponding moral human right). Before that conclusion can be drawn, an extra step is required, in which it has to be shown that the case at hand *falls outside* the margin of error introduced by "typically." Among other things, this means that to wield the NMV, one has to have some reasonable sense of *where* the boundaries of its margin of error lie. Without that, the NMV is not a very useful guide to the evaluation of international human rights law.

VII. WHETHER? OR, BENTHAM FLAUNTED AND A SWEATER UNRAVELED

This Article advances two arguments against the MDT, one in its own right and another in Jeremy Bentham's.[76] The Benthamite argument departs from a premise this Article does not endorse but will nevertheless be enlightening to discuss. Bentham famously and very colourfully rejects the existence of any moral rights.[77] Rights, he held, are children of the law and of the law alone. "There are no rights without law."[78] Thus, in his view, a moral right—or, indeed, any nonlegal right—is a contradiction in terms: a "son that never had a father" or, even better, a "sort of dry moisture."[79] For convenience, the relevant entailment of his position can be regimented as

(B) there are no moral human rights.

While this Article does not accept (B), it is certainly pertinent to the evaluation of the MDT; and it is very useful to be able to examine (B)'s implications for the MDT without being tarred with the premise itself.

Together, the MDT and (B) entail that no international legal human rights are morally justified. After all, even without puzzling over the manifold variety of justificatory relations permitted by the MDT, each of them patently presupposes the existence of some moral human right or other, in relation to which the international legal human right being evaluated can be justified. If there simply are no moral human rights, then the necessary condition the MDT lays down can never be satisfied. What (B) affirms is precisely that antecedent.

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76. JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Batoche Books 2000) (1789) [hereinafter BENTHAM, PRINCIPLE OF MORALS AND LEGISLATION].

77. *See, e.g.*, H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY 79 (Oxford Univ. Press 1982).

78. 3 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 221 (John Bowring ed., 1843).

79. *Id.* at 334–35.

Now, despite his hostility to moral rights, Bentham himself did not deny for a minute that legal rights could be morally evaluated. In his view, some were justified, while others were not. It all depended on a detailed analysis of the facts, backed by the assiduous application of his Greatest Happiness Principle. Indeed, this was a project to which he devoted a good part of his remarkable energy.[80] There is no reason to think that international legal rights—including legal rights ascribed to every individual (thus, international legal human rights)—are excluded from the scope of this project or that the range of outcomes would be any different (some justified, others not).

This Article's first argument treats the conclusion that no international legal human rights are morally justified as a *reductio* of the MDT. It does not require that one accepts (B) or that one agrees with Bentham's evaluation of this or that (international) legal right. All it requires is that one accept the *coherence* of Bentham's basic project of morally evaluating legal rights—focusing, in this case, on international legal human rights—the coherence, that is, of evaluating them in utilitarian terms, against the background of (B). For the MDT entails that Bentham's project is actually incoherent, insofar as the evaluative outcomes are guaranteed *ab initio* to be negative (making them pointless to investigate, let alone to investigate case by case). If this verdict seems too strong, then the MDT must go.

The force of this Benthamite argument is to highlight the extraordinary strength of the conceptual constraint that the MDT imposes on the justification of international legal human rights. However, the MDT can also be rejected without entertaining (B), and even while denying it. The MDT can also be rejected, that is, while affirming that moral human rights exist. This is fortunate, of course, since moral human rights do exist.

Like its eponymous inspiration, then, the Benthamite argument is perhaps a little provocative. To that extent, this Article may have courted gratuitous danger just by trotting it out, somewhat akin to waving a red herring in front of a bull. But the crux of the matter is not whether moral human rights exist. It is rather whether the justification of every justified international legal human right must be anchored somehow in some moral human right.

Tasioulas's distinction between moral rights and human interests is a convenient place to begin to see why the answer to this question is negative. [81] Tasioulas locates the relevance of this distinction in the fact that moral rights, but not mere interests, are

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80. *See, e.g.*, BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 76.

81. In fact, it may well be that Tasioulas's appeal to this distinction should itself be understood as an objection to Bentham and his successors.

necessarily associated with moral *obligations*.[82] He then proceeds to enumerate four features of obligations in this context: obligations are categorical; they are weighty; failure to comply with them is wrongful; and they are directed.[83] For the purposes of this Article, the second and fourth features are the most significant.

Obligations are *weighty* insofar as they are "robustly resistant to being defeated by, or 'traded-off' against, other considerations, including other obligations," as Tasioulas puts it.[84] Most of the time, in other words, a moral obligation will prevail in any conflict with other moral considerations, so that the action it requires will also wind up being what the agent is morally required to do, all things considered. It is this feature of moral obligations that makes them well suited to justifying legal rights. For legal rights are also necessarily correlated with obligations—specifically, with legal obligations.[85] Hence they, too, are weighty. Although hardly an unassailable axiom, it is at least a reasonable conjecture that a weighty input is required to justify a weighty output.[86] That is presumably the basis of Tasioulas's scanting of mere interests as justificatory grounds for legal rights. Unlike moral obligations, mere interests are not guaranteed to be weighty in themselves. While Bentham would protest, this Article will accept the following restriction on the justification of legal rights:

> (R) no legal right can be justified unless its correlative legal obligation gives effect to some moral obligation.

The formulation of (R) is meant to reflect the fact that the considerations on which it rests—the weightiness of moral obligations together with the reasonable conjecture—are not confined to human rights, but apply more generally.

The "directedness" of an obligation refers implicitly to the fact that some obligations are *owed to* specific individuals (as the performance of a promise is owed to the promisee), while other obligations are not owed to anyone (Tasioulas's examples are obligations of charity and mercy).[87] Directed obligations are owed to someone and nondirected obligations are not owed to anyone. With yet other obligations, it is controversial or unclear whether they are directed or not (e.g., the

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82. *See supra* Part V.

83. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1180–81. The third feature is arguably entailed by the fourth, as Tasioulas himself seems to accept by the end of this stretch of text.

84. *Id.* at 1180.

85. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913).

86. Here we brush up against a complicated philosophical question to do with the scope of permissible aggregation. This is the moral equivalent of asking, can some number of very small rocks be combined to offset a boulder? The conjecture in the text imposes a limit on aggregation.

87. Gopal Sreenivasan, *Duties and Their Direction*, 120 ETHICS 465 (2010).

state's obligation to supply this or that pure public good).[88] To resolve these controversial cases, one has to fall back on a theory of what accounts for the direction of a directed obligation. As Tasioulas says, this is a "difficult question."[89]

Viewed aright, all the materials needed to settle the question of whether to accept the MDT are now in hand.[90] As a reminder, this thesis holds that

> (MDT) it is a necessary condition on the moral justification of a given international legal human right that it be suitably related to some moral human right.

The crucial point to observe is that the MDT's necessary condition anchors the justification of international legal human rights in moral human *rights*. By contrast, (R)'s necessary condition is denominated in terms of moral *obligations*. However apparently innocent, this small difference is actually the loose yarn at the end of which lies the sweater's demise.

Moral rights are necessarily correlated with moral obligations. More specifically, moral rights correlate with *directed* moral obligations, a crucial detail Tasioulas explicitly accepts.[91] Indeed, this more specific correlation affords one way to describe the person to whom a directed obligation is owed, namely, as the holder of the correlative right.[92] The trouble for the MDT begins from the fact that the directedness of moral obligations is a different feature of moral obligations from their weightiness. That is to say, the feature of moral obligations that associates them with moral rights is a different feature from the feature that grounds the suitability of moral obligations to justify legal rights and on which (R) rests in part. Since they are different features, there is room for them to come apart.

It is not that this room leads to any difficulty in a moral human right's satisfying either (R)'s necessary condition or the grounds for it. There is no difficulty there. The moral obligation correlative to a moral human right is both directed and weighty, just as Tasioulas's enumeration suggests. Hence, whenever a moral human right's correlative obligation is given legal effect by some international legal

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88. Tasioulas and I disagree about whether the obligation to supply a pure public good can be directed. He thinks it can be, whereas I think it cannot be. *See* Gopal Sreenivasan, *Public Goods, Individual Rights, and Third-Party Benefits*, *in* NEW ESSAYS ON THE NATURE OF RIGHTS 127–48 (Mark McBride ed., 2017).

89. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1181.

90. This question has become our surrogate for asking: whether the FAT?

91. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1181.

92. This fact does not itself help us to identify the relevant person. One can know that two descriptions are equivalent without knowing who fills the role they both describe.

human right, that moral right satisfies both (R)'s necessary condition and the grounds for it.[93]

Rather, the difficulty arises because *nondirected* moral obligations are also weighty. This is a trivial consequence of the fact that nondirected moral obligations are, precisely, obligations. Hence, whenever a nondirected moral obligation is given legal effect by some international legal human right, it too will satisfy both (R)'s necessary condition and the grounds for it. However, since nondirected moral obligations do not correlate with moral rights—and, *a fortiori*, do not correlate with moral human rights—they can never satisfy the MDT's necessary condition.

What this brings out is that the MDT is actually *more* restrictive than (R), despite the fact that (R) is meant to explain and justify the MDT. Thus, nondirected moral obligations can satisfy the *grounds* for the MDT's necessary condition—because they are weighty and so satisfy (R)'s necessary condition—while nevertheless failing to satisfy the MDT's necessary condition. It follows that the MDT is more restrictive than has been justified so far—more restrictive, certainly, than can be justified by appealing to the weightiness of moral obligations. At this point, the sweater has come at least half unraveled.

Now, in principle, the most intuitive response to this objection would be to try to solder the two critical features of moral obligations together somehow, since their coming apart is the origin of the difficulty for the MDT here.[94] Executing this response requires a deep dive into what accounts for the direction of a directed obligation—a "difficult" question, as Tasioulas admits.[95] Worse, what the saviour of the MDT needs is not any old solution to this puzzle, but a solution on which the direction of an obligation is grounded in its weight. It is fair to say, however, that the prospects for this sort of solution are entirely bleak. On none of the major theories—and none of the minor ones either, for that matter—is the direction of a directed obligation

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93. Any moral human right that is given legal effect by some international legal human right also satisfies the MDT's necessary condition in relation to that legal right. Thus, whenever a moral human right satisfies the MDT's necessary condition, it also satisfies (R)'s necessary condition.

94. There is another promising response to this objection, but it is not available to Tasioulas, since he rejects political accounts of human rights. *See supra* note 34. Someone else might concede that the special weight of obligations correlative to moral human rights has nothing to do with their directedness (and hence, nothing to do with moral rights generically), while insisting that these obligations do have a special weight and that it is due instead to the distinctive *function* of human rights (e.g., as limiting the exercise of state sovereignty). In that case, it would make perfect sense for the MDT to be more restrictive than (R). *See* Buchanan & Sreenivasan, *supra* note 5, 216–18 (discussing this reply and explaining why it does not work).

95. Tasioulas, *Saving Human Rights*, *supra* note 1, at 1181.

grounded in its weight.[96] The weight of a moral obligation appears to be simply irrelevant to its directedness.

It may be instructive to consider Joseph Raz's theory briefly, as a case in point, since his solution is probably the closest of those already in the literature to what defenders of the MDT require. According to Raz, and simplifying a little, X holds a right correlative to Y's obligation just in case X's interest is, other things equal, sufficient to justify imposing that obligation on Y.[97] What accounts for Y's obligation being *owed to* X, on this solution, is the fact that X's interest (an aspect of his or her well-being) plays a significant justificatory role in Y's being under that obligation.

Raz's solution is close to what defenders of the MDT require insofar as the conditions under which Y's obligation has a direction here can be plausibly redescribed in terms that *refer to the weight* of Y's obligation. To wit, the weight of X's interest must be commensurate with the weight of Y's obligation, as a condition of the former's being sufficient (other things equal) to justify the latter. In other words, at least implicitly, the weight of Y's obligation does at least figure in the conditions under which Raz declares that Y's obligation has a direction.

But that, alas, is as close as it gets. Nothing in Raz's criterion implies anything about *how weighty* Y's moral obligation is. *A fortiori*, nothing is implied about whether Y's moral obligation is notably weighty (and so, especially conducive to justifying an international legal human right). Instead, Raz's criterion takes the weight of Y's moral obligation as given. Its weight is what it is. So far from being regulated by his criterion, the magnitude of this weight is rather deployed as a target for something else: Once given the weight of Y's moral obligation, Raz requires that *X's interest* have a commensurate weight, as a condition of X's qualifying as the person to whom Y's obligation is owed. None of this, then, offers any succour to the MDT.

A tidy illustration and summary of the essentials can be found in the aforementioned controversy about whether individuals can hold rights correlative to obligations to supply some pure public good (PPG). Suppose the state has a moral obligation to supply some PPG. Let the weight of this obligation be whatever it may be. Suppose, furthermore, that this same public good falls within the scope of some international legal human right, the right to Z.[98] The right to Z therefore gives international legal effect to the state's moral obligation to supply PPG.

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96. For an overview, complete with vindication of the claim in the text, *see* Sreenivasan, *supra* note 87, at 465–94.

97. JOSEPH RAZ, THE MORALITY OF FREEDOM 1, 166 (Oxford Univ. Press 1986).

98. The right to Z does not have to be a right to PPG directly. Recall the objections to the NMV's correspondence requirement. It is enough, for example, if PPG makes an important instrumental contribution to the realization of Z, whatever Z might be.

What follows? The state's moral obligation is either directed or it is nondirected. Yet either way, it has the generic weightiness of an obligation. Hence, the international legal human right to Z satisfies (R). For exactly the same reason, it also satisfies the grounds of the MDT's necessary condition.

But does it satisfy the MDT itself? That depends on whether individuals hold moral (human) rights correlative to the state's moral obligation to supply PPG.[99] Say Tasioulas is correct and individuals (can and) do have moral rights to public goods, including to PPG. Then the international legal human right to Z does satisfy the MDT. However, even if all of this is true, it does not change the weight of the state's moral obligation to supply PPG one whit. Consequently, it adds nothing to the moral justification of the right to Z.[100] It is therefore arbitrary and unjustified to insist on a correlative moral right here, as a necessary condition—but effectively, an empty one—of the moral justification of the international legal human right to Z. Since that is precisely what the MDT does, the MDT should be rejected. All that is left now is a pile of yarn.

VIII. CONCLUSION

This Article's concern has been with Tasioulas's analysis of international human rights law. One focus of discussion has been cases of pure human rights inflation, illustrated by Tasioulas's example of the international legal human right to annual paid leave. What makes an international legal human right a case of *pure inflation* is that it does not give effect to any moral human right. Tasioulas maintains that such cases are not morally justified. His argument for this conclusion tacitly relies upon what this Article has called the moral dependence thesis. This thesis holds that it is a necessary condition on the moral justification of a given international legal human right that it be suitably related to some moral human right.

This Article has argued against the moral dependence thesis. However, this is not to defend the international legal human right to annual paid leave or any other case of pure rights inflation. The point is only that cases of pure rights inflation are not automatically excluded from being morally justified, simply because they have no footprint in any moral human right. While moral human rights can

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99. For simplicity, I ignore the complications in what follows that would attend respecting the difference between moral rights and moral human rights. They do not affect anything of importance for present purposes.

100. A parallel analysis applies to the opposite case, where individuals do not hold moral rights to PPG. In that case, the international legal human right to Z fails to satisfy the MDT. But this does not change the weight of the state's moral obligation to supply PPG at all either. Consequently, it subtracts nothing from the moral justification of the right to Z.

certainly be relevant to the enterprise, the moral evaluation of international legal human rights is nevertheless substantially independent of moral human rights. Some cases of pure human rights inflation may thus be perfectly morally justified, even if other cases are not. To decide which cases are which, there is no substitute for a detailed case-by-case analysis. On that score, anyhow, Bentham had it exactly right.

Tasioulas's negative moral evaluation of pure human rights inflation begins by describing such cases as deviations from the formative aim of international human rights law. According to his formative aim thesis, international human rights law primarily aims to give effect to moral human rights (insofar as it is appropriate for international law to do so, through the technique of assigning a uniform set of individual legal rights to all humans). In Tasioulas's analysis, the normative role of the formative aim thesis is to license moral evaluations of international human rights law.

By rejecting the moral dependence thesis, this Article has revoked the licence for his negative evaluation of pure human rights inflation. However, it also accepted (for the sake of argument) that the formative aim thesis correctly describes the practice of human rights. This means that cases of pure inflation still count, descriptively, as deviations (i.e., as evaluatively neutral "deviations"). If the formative aim thesis can be given a suitable normative backing, it might yet be able to license (negative) moral evaluation of the other "deviations" Tasioulas has described, such as the overjudicialisation of moral human rights. That remains to be seen.

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